PP v. MAITHAM K ALWAN (IRQ)

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
ZAKARIA SAM JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEAL NO: B-05(LB)-57-01-2016(IRQ)]
20 NOVEMBER 2017

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 670.1g of methamphetamine – Drugs found in thermos carried by accused at airport – Hole in box where thermos discovered – Whether gave rise to assumption that someone else put drugs in thermos – Whether accused was framed – Alcontara's notice – Whether arose – Defence of innocent carrier – Whether accused's docile behaviour inferred an absence of knowledge of drugs – Whether conduct of respondent amounted to wilful blindness – Failure to rebut presumption of knowledge and possession under s. 37(d) of Dangerous Drugs Act 1952 – Whether trafficking charge against accused proved beyond reasonable doubt*

The respondent, an Iraqi national, was charged before the High Court with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). On 8 March 2012, PW2 and his team was on surveillance duty at the International Arrival Hall of Kuala Lumpur International Airport ('KLIA') when the respondent, who was trolling a trolley with a box and a bag on it, was seen behaving suspiciously. The respondent was thus detained for inspection and a search was conducted in the box ('P23'), where an aluminium thermos with a brand named 'relax' was found. PW2 opened the bottom of the thermos and discovered in it 105 capsules each containing substance suspected to be dangerous drugs. Upon analysis, the chemist confirmed that the said capsules contained 670.1g of methamphetamine. In the High Court, the trial judge held that the respondent was caught 'red handed' with the impugned drugs and that the respondent had custody and control of it. Thus, the trial judge found that the respondent had possession of the impugned drugs and invoked the statutory presumption under s. 37(d) of the Act for the element of knowledge. As for the element of trafficking, the trial judge relied on the evidence of the respondent's overt act in carrying and concealing the drugs in the thermos inside P23 and transporting them from Baghdad to Abu Dhabi and then to Malaysia. Considering the amount of the drugs involved which could not have been for his own personal consumption, the trial judge held that the respondent was trafficking in dangerous drugs under s. 2 of the Act. Satisfied that all the elements of the charge had been established, the trial judge held that the prosecution had proved a *prima facie* case against the respondent on the charge proffered against him. Thus, the respondent was called upon to enter his defence. In his evidence, the respondent stated that he came to Malaysia looking for a suitable job, and that his friend, one Hussain Helli, was supposed to receive him at the airport. According to the respondent,

A before he came to Malaysia, a family friend by the name of Shayan gave him P23, which Shayan allegedly told him contained household appliances, to be delivered to Razak, Shayan's brother. The respondent denied any knowledge of the drugs inside the thermos in the box. After considering the respondent's version, the trial judge found that (i) the respondent had succeeded in raising B a reasonable doubt on the prosecution's case *ie*, due to a hole to the box while it was in transit; (ii) that the respondent's evidence as to his conduct showed that he had no knowledge of the impugned drugs and that the respondent was an innocent carrier; and (iii) that the respondent's version about Hussain Helli and Shayan was to be believed as they were not fictitious persons. The C respondent was thus acquitted and discharged of the charge proffered against him. Hence, this appeal.

Held (allowing appeal)
Per Kamardin Hashim JCA delivering the judgment of the court:

D **(1)** The trial judge had over-emphasised the issue in regard to the hole in P23 to the extent that Her Ladyship made a baseless assumption, without evidence in support, that someone had put the drugs in the thermos and/or that it was a framed up case. There was not an iota of evidence to suggest that the respondent was a victim of a framed up. (para 26)

E **(2)** On the issue of the Digi sim card where the trial judge had put the blame on the police for its failure to investigate Shayan's and Razak's phone numbers, it was the prosecution's case that the sim card taken from the respondent was not a Digi sim card but a sim card written with Arabic words. During the trial, there was no real dispute about the sim card. F PW2 and PW3 could not understand the sim card and was unable to carry out a proper investigation due to lack of information in the said card. Thus, PW3 could not be blamed for this. The trial judge had fallen into error in putting the blame on the prosecution's witnesses for the failure to investigate the sim card without considering the explanation G given by PW2 and PW3 that there were no details supplied by the respondent except that they were foreign telephone numbers. There was no effective *Alcontara*'s notice that had been given by the respondent. (paras 22, 29 & 30)

H **(3)** In holding the issue on non-investigation of the sim card in favour of the respondent, the trial judge had relied on two earlier judgments, *Ghasem Gharezadehsharbiani Hassan v. PP* and *Emeka Promise v. PP*. However, these two earlier decisions had been overruled by the Federal Court respectively. Therefore, the two decisions cited and relied on by the trial judge was no longer a good law. (para 31)

I **(4)** The respondent's docile conduct throughout the period he was detained till the discovery of the impugned drugs did not necessarily infer an absence of knowledge of the drugs. Whether the respondent was an

innocent carrier without knowledge or otherwise was a question of fact. In his evidence, the respondent said that he had checked the contents of P23 and found nothing unusual. P23 was found to contain a hairdryer, a Hi-Fi and a thermos. Looking at the three items, the respondent ought to have been curious and suspicious since the three items were easily available in open market in Malaysia. Obviously, the respondent would not have taken them in the box into Malaysia if not for the more valuable things *ie*, the impugned drugs cleverly concealed in one of the thermos. The respondent was not a naive and dumb witted person. The conduct of the respondent amounted to a wilful blindness. The respondent had therefore failed to rebut the presumption of knowledge and possession under s. 37(d) of the Act on the balance of probabilities. The trafficking charge had been proven beyond reasonable doubt against the respondent. (paras 32-39 & 42)

Bahasa Malaysia *Headnotes*

Responden, yang berasal dari negara Iraq, dituduh di Mahkamah Tinggi dengan kesalahan mengedar dadah berbahaya bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada 8 Mac 2012, PW2 dan pasukannya sedang menjalankan tugas pengawasan kawasan di Balai Ketibaan Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') apabila melihat responden, yang sedang menolak troli yang mengandungi sebuah kotak dan beg, berkelakuan mencurigakan. Responden selepas itu ditahan untuk pemeriksaan dan satu carian dijalankan dalam kotak ('P23'), di mana satu termos aluminium berjenama 'relax' dijumpai. PW2 membuka bahagian bawah termos itu dan mendapati terdapat 105 kapsul yang masing-masing mengandungi bahan yang disyaki dadah berbahaya. Selepas dianalisa, ahli kimia mengesahkan bahawa kapsul-kapsul tersebut mengandungi 670.1g methamphetamine. Di Mahkamah Tinggi, hakim bicara memutuskan bahawa responden ditangkap secara 'red handed' dengan dadah-dadah berbahaya dan responden mempunyai milikan dan kawalan ke atasnya. Oleh itu, hakim bicara mendapati bahawa responden mempunyai milikan ke atas dadah-dadah berbahaya tersebut dan mengguna pakai anggapan berkanun bawah s. 37(d) Akta bagi elemen pengetahuan. Untuk elemen pengedaran, hakim bicara bergantung pada keterangan kelakuan terbuka responden membawa dan menyembunyikan dadah-dadah dalam termos dalam P23 dan mengangkutnya dari Baghdad ke Abu Dhabi dan kemudiannya ke Malaysia. Mengambil kira jumlah dadah yang terlibat tidak mungkin untuk penggunaan sendiri, hakim bicara mendapati bahawa responden mengedar dadah berbahaya bawah s. 2 Akta. Berpuas hati bahawa semua elemen-elemen pertuduhan telah dibuktikan, hakim bicara memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap responden atas pertuduhan terhadapnya. Oleh itu, responden dipanggil membela diri. Dalam keterangannya, responden menyatakan bahawa dia ke Malaysia untuk mencari pekerjaan yang sesuai dan bahawa kawannya, seorang bernama Hussain Helli, sepatutnya menjemputnya dari lapangan terbang. Menurut

responden, sebelum dia ke Malaysia, kawannya bernama Shayan telah memberikan P23, di mana Shayan telah memberitahunya mengandungi perkakas rumah, untuk dihantar kepada Razak, abang Shayan. Responden menafikan apa-apa pengetahuan berkenaan dadah-dadah yang terdapat dalam termos di dalam kotak itu. Selepas mempertimbangkan versi responden, hakim bicara mendapati (i) responden berjaya membangkitkan keraguan munasabah ke atas kes pendakwaan iaitu berdasarkan lubang yang terdapat di kotak itu semasa dalam transit; (ii) keterangan responden berkenaan kelakuannya menunjukkan dia tidak mempunyai pengetahuan berkenaan dadah-dadah itu dan responden hanyalah pembawa tidak bersalah; dan (iii) bahawa versi responden berkenaan Hussain Helli dan Shayan harus dipercayai kerana mereka bukanlah orang rekaan. Responden dengan itu dilepaskan dan dibebaskan daripada pertuduhan terhadapnya. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan)

Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah memberi penekanan berlebihan pada isu berkaitan lubang dalam P23 sehingga membuat andaian tidak berasas tanpa bukti bagi menyokong bahawa seseorang telah meletakkan dadah-dadah dalam termos dan/atau ini adalah kes perangkap. Tiada keterangan untuk menunjukkan bahawa responden adalah mangsa perangkap.

(2) Berkenaan isu kad sim Digi di mana hakim bicara telah menyalahkan pihak polis atas kegagalan mereka menyiasat nombor telefon Shayan dan Razak, adalah kes pendakwaan bahawa kad sim yang diambil daripada responden bukan kad sim Digi tetapi kad sim yang mempunyai tulisan bahasa Arab. Semasa perbicaraan tiada pertikaian timbul berkenaan kad sim itu. PW2 dan PW3 tidak dapat memahami kad sim tersebut dan tidak berupaya untuk menjalankan penyiasatan yang betul akibat ketiadaan maklumat dalam kad tersebut. Oleh itu, PW2 tidak boleh dipersalahkan. Hakim bicara telah terkhilaf apabila menyalahkan saksi-saksi pihak pendakwaan untuk kegagalan menyiasat kad sim tanpa mengambil kira penjelasan yang diberikan oleh PW2 dan PW3 bahawa tiada butiran dibekalkan oleh responden kecuali nombor telefon asing. Tiada notis *Alcontara* yang berkesan telah diberikan oleh responden.

(3) Dalam memutuskan isu tiada penyiasatan kad sim memihak kepada responden, hakim bicara bergantung pada dua penghakiman terdahulu, *Ghasem Gharezadehsharbiani Hassan v. PP* dan *Emeka Promise v. PP*. Walau bagaimanapun, kedua-dua keputusan itu telah ditolak oleh Mahkamah Persekutuan. Oleh itu, kedua-dua keputusan yang disebut dan dirujuk oleh hakim bicara bukan lagi undang-undang yang boleh dipakai.

(4) Kelakuan responden yang mematuhi sepanjang tempoh dia ditahan sehingga penemuan dadah-dadah tidak bermaksud dia tidak mengetahui berkenaan dadah-dadah itu. Sama ada responden adalah pembawa tidak bersalah tanpa pengetahuan atau sebaliknya adalah persoalan fakta.

Dalam keterangannya, responden menyatakan bahawa dia telah memeriksa kandungan P23 dan tidak menjumpai apa-apa yang ganjil. Kotak yang dijumpai mengandungi pengering rambut, Hi-Fi dan termos. Melihat pada ketiga-tiga item ini, responden sepatutnya hairan dan was-was kerana ketiga-tiga item boleh didapati dengan mudah dalam pasaran terbuka di Malaysia. Dengan jelasnya, responden tidak akan membawanya dalam sebuah kotak ke Malaysia jika tidak kerana terdapat barang-barang yang lebih berharga iaitu dadah-dadah yang dipertikaikan yang telah disembunyikan dalam salah satu termos. Responden bukannya orang naif dan bodoh. Kelakuan responden berjumlah kepada tindakan yang melulu. Responden dengan itu gagal untuk menyangkal anggapan pengetahuan dan milikan bawah s. 37(d) Akta atas imbangan kebarangkalian. Pertuduhan pengedaran telah dibuktikan melampaui keraguan munasabah terhadap responden.

Case(s) referred to:
Emeka Promise v. PP [2015] 3 CLJ 916 CA ***(refd)***
Ghasem Gharezadehsharbiani Hassan v. PP [2014] 1 LNS 752 CA ***(refd)***
PP v. Herlina Purnama Sari [2017] 1 MLRA 499 ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 181 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(2), First Schedule

For the prosecution - Kwan Li Sa; DPP
For the respondent - Edmund Bon Tai Soon & Joshua Tay; M/s AmerBON

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-45-02-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] The respondent, an Iraqi national, was charged before the High Court at Shah Alam with an offence of trafficking in dangerous drugs an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The charge read as follows:

Bahawa kamu pada 8.3.2012, jam lebih kurang 3 petang di kawasan Kaunter Pemeriksaan Kastam, Balai Ketibaan Antarabangsa, Aras 3, Bangunan MTB, KLIA di dalam daerah Sepang, di dalam negeri Selangor, telah mengedar dadah berbahaya jenis Methamphetamine dengan berat 670.1 gram. Dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the end of the prosecution's case, the learned High Court Judge ("learned trial judge") was satisfied that the prosecution had established a *prima facie* case on the proffered charge against the respondent. Accordingly, the respondent was called upon to enter his defence.

[3] Upon hearing the defence, the learned trial judge had acquitted and discharged the respondent after holding that the respondent had succeeded in creating a reasonable doubt on the prosecution's case on the ground that the respondent was an innocent carrier without the prerequisite knowledge of the impugned drugs.

[4] Aggrieved, the Public Prosecutor appealed to this court against the said acquittal. We heard the appeal on 4 October 2017 and we allowed the appeal. We now give our grounds in doing so.

Prosecution's Case

[5] The prosecution's case may be summarised as follows. On 8 March 2012, at about 3pm, Detective Sergeant Nor Reshiam bin Kasim (PW2) and his team were on surveillance duty at the Carousel F at the International Arrival Hall of Kuala Lumpur International Airport ("KLIA"). PW2 saw the respondent behaving suspiciously while trolling a trolley with a box and a bag on it. SP2 stopped the respondent after introducing himself as a police officer and asked for the respondent's passport.

[6] PW2 then asked the respondent to put his luggage on the scanning machine. The scan disclosed nothing incriminating. The respondent was brought to the narcotics investigation office for further inspection. Body search was done on the respondent but nothing incriminating was found. PW2 also conducted a search on the bag, but nothing incriminating discovered from the bag.

[7] Upon checking the box, PW2 discovered among other things, an aluminum thermos with a brand named 'AWA' and another thermos with a brand named 'relax'. PW2 was suspicious of the weight of the thermos with a brand named 'relax'. He opened the bottom of the thermos and discovered in it 105 capsules each containing substance suspected to be dangerous drugs.

[8] The 105 capsules suspected to be dangerous drugs were later sent to Suhana Ismail (PW1), a chemist at the Chemistry Department, Petaling Jaya for analysis. PW1 confirmed upon analysis that the 105 capsules contained 670.1g of methamphetamine. PW1 also confirmed that methamphetamine is a dangerous drug listed in the First Schedule of the Act.

Findings Of The Trial Judge At The End Of The Prosecution's Case

[9] The learned trial judge considered and accepted the evidence of PW1 on the drugs analysis undertaken by the witness. The learned trial judge concluded that there was no defect in PW1's analysis and there was no

challenge by the defence on the identity of the impugned drugs. The learned trial judge as well accepted the evidence of PW1 on the type and weight of the drugs, the subject matter of the charge.

[10] As for the element of possession, the learned trial judge accepted the evidence of PW2 and the investigating officer, Inspector Haryati bte Zahruddin (PW3), as to the factual matrix of the case. The respondent was detained while trolling a trolley with a bag and a box (P23) on it. The box carried with it a baggage tag (P23A) in the respondent's name. Inside the box, a thermos was recovered and inside it, the impugned drugs in the form of 105 capsules were recovered by PW2. The learned trial judge held that the respondent was caught 'red-handed' with the impugned drugs. Therefore, it was further held that the respondent had custody and control of the impugned drugs. The learned trial judge found that the respondent had possession of the impugned drugs and invoked the statutory presumption under s. 37(d) of the Act for the element of knowledge.

[11] As for the element of trafficking, the learned trial judge relied on the evidence of the respondent's overt act in carrying and concealing the drugs in the thermos inside P23 and transporting them from Baghdad to Abu Dhabi and then to Malaysia as evinced from the respondent's passport (P14), boarding passes (P15 and P16), baggage tag (P17), the itinerary (P18) and the flight ticket (P19), and considering the amount of the drugs involved which could not have been for his own personal consumption, the learned trial judge held that the respondent was trafficking in the dangerous drugs under s. 2 of the Act.

[12] After being satisfied that all the elements of the charge had been established, the learned trial judge held that the prosecution had proven a *prima facie* case against the respondent on the charge proffered against him. Thus, the respondent was called upon to enter his defence.

The Defence

[13] The respondent elected to give evidence under oath. The respondent was the sole witness for the defence. In his evidence, the respondent stated that he was from Iraq and worked as a carpenter. He came to Malaysia looking for a suitable job. He could no longer stay and works in Iraq because of the war and the political turmoil. All his siblings and many of his family members had left Iraq. His friend, Hussain Helli, had suggested to him to come and work in Malaysia.

[14] According to the respondent, he had been to Malaysia previously three times, all regarding his work and his place of abode in Malaysia. Hussain Helli helped him with all the arrangements to get the job for him as a carpenter in Malaysia. For that, the respondent had to pay Hussain Helli RM8,000.

[15] On 8 March 2012, he came to Malaysia to take up the work as a carpenter. Hussain Helli supposed to receive him at the airport and he had told this to the police officer who detained him. Before he came to Malaysia, one of his family members' friend by the name of Shayan gave him the box (P23). Shayan asked for his help to deliver the box to a student by the name of Razak, who was the brother of Shayan. He was told by Shayan that the box contains households appliances. Shayan gave him Razak's phone number written on a piece of paper (D21A). After checking the contents of the box, he agreed to help Shayan with the delivery of the box to Razak.

[16] When he reached the airport in Baghdad, he wrapped the box and he checked-in the box. A baggage tag was issued in his name. He did not see the box when he was on transit at the Abu Dhabi Airport. When he reached at KLIA, he got hold of the box from the floor and not on the carousel. He noticed there was a hole on the box. He was detained after the police discovered the drugs in the box. The respondent denied any knowledge of the drugs inside the thermos in the box. He had informed the police that the box belongs to Razak and that Hussain Helli was waiting for him outside. The police just ignored him. He had informed the investigating officer of the same information.

[17] After considering the respondent's version, the learned trial judge found that the respondent had succeeded in raising a reasonable doubt on the prosecution's case. The learned trial judge held that the respondent's evidence as to his conduct showed that he had no knowledge of the impugned drugs and that the respondent was an innocent carrier. Learned trial judge also held that there was doubt raised as there was a hole to the box while it was in transit. The learned trial judge accepted and believed the respondent's version about Hussain Helli, Shayan and Razak, and they were not fictitious persons.

[18] In her grounds, the learned trial judge had summarised her reasons in acquitting the respondent as follows (pp. 51 - 52 AR vol. 1):

> Rumusan saya di dalam kes ini adalah pihak pembelaan telah berjaya menimbulkan satu keraguan yang munasabah terhadap kes pihak pendakwaan. Alasan saya secara ringkasnya adalah seperti berikut iaitu Shayan adalah seorang yang benar-benar wujud dan bukan seorang fictitious character. Exhibit D21A menyokong keterangan tertuduh. Saya berpendapat besar kemungkinan tertuduh tidak berpengetahuan tentang dadah yang tersembunyi di dalam P23F dan hanya bersetuju untuk membantu Shayan menghantar kotak P23 kepada seorang Razak selepas memeriksa kandungan P23 tersebut dan mendapati tiada apa-apa barang yang mencurigakan. Tertuduh tidak membantah ketika diarahkan oleh SP2 untuk membuat pengimbasan terhadap kotak P23. Perkara-perkara berkenaan Shayan dan Razak telah dimaklumkan kepada pihak polis, namun tidak disiasat dengan lanjut oleh pihak polis.

Saya merujuk kepada kes *Rina Simanjuntak v. PP* [2015] 2 CLJ 912 bahawa tertuduh adalah seorang innocent carrier bagi seorang yang bernama Shayan. Bagi saya, keterangan-keterangan yang telah dikemukakan oleh pihak pembelaan adalah jelas dan mencukupi untuk menangkis (rebut) anggapan di bawah seksyen 37(d) di atas imbangan kebarangkalian.

[19] The respondent was thus acquitted and discharged of the charge proffered against him. Hence, the appeal before us.

The Appeal

[20] Before us, the learned Deputy Public Prosecutor ('learned Deputy') canvassed four pillar points which had been the grounds of the learned trial judge in acquitting the respondent. They were, namely:

(i) the appearance of the hole to the box, P23;

(ii) the Digi sim card;

(iii) the two earlier decisions by this court relied by the learned trial judge; and

(iv) insufficient evaluation of the defence.

[21] In regard to the issue of the hole in the box, learned Deputy's complaint was that the learned trial judge lent so much impact on the hole even though the contents of the box were still the same as admitted by the respondent. Learned Deputy argued that there were no evidence adduced that the box had been tampered with and there was no evidence of a frame -up.

[22] In regard to the second issue on Digi sim card, the learned Deputy argued that the learned trial judge erred when Her Ladyship put the blame on the police for failure to investigate Shayan's and Razak's phone numbers. Learned Deputy submitted that in fact, there was no Digi sim card seized by the police except a sim card with Arabic written on it. Secondly, learned Deputy argued that the police cannot be blamed for not investigating the persons named Shayan and Razak as no particulars of both of them have been supplied by the respondent. Learned Deputy argued that no effective *Alcontara*'s notice has been given by the respondent in this case.

[23] The third issue was related to the learned trial judge reliance on two previous decisions by this court which was overruled by the Federal Court. It was argued that the learned trial judge was wrong in reliance on the two decisions which are no longer a good law.

[24] On the final issue, learned Deputy's complaint was that the learned trial judge had failed to adequately evaluate the defence of innocent carrier put forth by the respondent. Learned Deputy submitted that the defence of an innocent carrier was not probable and it was an afterthought for failure

of the respondent to mention anything about Shayan and Razak at the time of the arrest and the same not mentioned in his cautioned statement to the police.

Our Decision

[25] In regard to the first issue with respect to the hole in the box (P23) which contained the thermos where the impugned drugs were found, we agree with the learned Deputy that the learned trial judge was wrong in lending so much impact on the prosecution's case. In her judgment, the learned trial judge stated as follows (pp. 39-41 AR vol. 1):

> Selain daripada itu, Mahkamah juga dapati berdasarkan pemerhatian yang teliti terhadap foto-foto ekshibit P6, khususnya P6(8) telah mendedahkan bahawa terdapat satu kesan koyakan yang besar di bahagian kanan kotak tersebut. Saya bersetuju bahawa kesan koyakan tersebut cukup besar untuk memuatkan P23F di dalam kotak tersebut. Ketika diperiksa balas, SP2 telah memberikan keterangan seperti yang berikut iaitu beliau bersetuju tiada pengetahuan siapa yang kendalikan kotak sebelum OKT ditahan, tidak ambil gambar keadaan asal kotak sebelum dibuka, gambar P6(8) ialah selepas kotak dibuka, setuju apabila kotak dibuka, keadaan barang tidak dalam keadaan kemas. Beliau juga setuju ada koyakan di bahagian selaput kanan dan setuju tidak tahu bagaimana koyakan dibuat.
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> Berkenaan isu lubang yang berada di kotak P23, saya dapati tertuduh telah memberikan keterangan bahawa lubang tersebut hanya wujud selepas beliau tiba di KLIA. Namun demikian beliau menyangka bahawa lubang tersebut terhasil semasa penerbangan ketika kotak tersebut diangkut:
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> > There was no hole in the box when I give it at Iraq airport. Then I found the hole when I reached Malaysian airport. I thought the carry might be damaged because of that.
>
> Berdasarkan daripada keterangan kedua-dua SP2 dan SP3, boleh disimpulkan bahawa tiada seorang daripada mereka mengetahui bagaimana lubang tersebut terhasil. Bagi saya, hal ini amat penting memandang lubang tersebut cukup besar untuk memuatkan P23F ke dalam P23 dan oleh yang demikian, telah menimbulkan satu keraguan berkaitan dengan jagaan atau kawalan eksklusif P23F oleh tertuduh.
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> Disamping itu, tertuduh sendiri telah menyatakan bahawa beliau tidak mengetahui bagaimana lubang tersebut terhasil. Berdasarkan keterangan beliau, tiada sebarang lubang berada pada kotak P23 ketika beliau mendaftar masuk kotak tersebut di Baghdad. Apabila beliau ke kaunter tuntutan bagasi, beliau mendapati P23 berada di atas lantai dan bukan di atas carousel. Pada masa itu sahaja beliau perasan bahawa terdapat lubang di atas kotak P23. Atas sebab ini dan juga tanpa sebarang keterangan daripada pihak pendakwaan berkaitan dengan isu kehadiran lubang di dalam P23. Isunya, adakah kemungkinan kebarangkalian P23F telah diletakkan di dalam P23 oleh individu yang lain tanpa pengetahuan tertuduh.

[26] We observe that the learned trial judge had over-emphasised the hole issue to the extent Her Ladyship made a baseless assumption without evidence in support that someone had put the drugs in the thermos and/or that it was a framed up case. We agree with learned Deputy that there is not an iota of evidence to suggest that the respondent was a victim of a frame up.

[27] We also agree with the learned Deputy's complaint that the learned trial judge erred in ignoring the respondent's own evidence which is favourable to the prosecution which negates any possibility of a frame up. We think there is merit in this complaint. The relevant evidence of the respondent can be found at pp. 151 - 152 of the appeal records vol. 2B, as follows:

Q : Why did you open and check the box?

A : I open the box to make sure about to know nothing's can be lost and what's the item actually inside because Mr. Shayan told me that the items in the box just only for home using by anybody inside the house.

Q : When you check the box, was there a hole in the box?

A : No. When I gave the box at the Iraq Airport, there is no hole at whole the box. Then I found the hole when I reach the Malaysia Airport but I thought that was because of the carry, might be damaged.

Q : When you open the box, you said you see a thermos, hi-fi and hair dryer. Do you see any drugs or any prohibited items. Refer to P6 (7 and 8). Photo no. 7, is the box that you mention?

A : Yes.

Q : And when you open the box, is that the same thing that you see in photo No. 8?

A : Exactly as the way I saw now.

Q : But photo No.8, there is a hole on the right side?

A : I'm talking about the items inside. I'm not talking about the carton.

[28] On the second issue related to the Digi sim card, we find there are merits in the argument of the learned Deputy. The respondent had stated that he had given his hand phone and Digi sim card to PW2. It was the prosecution's case that the sim card taken from the respondent was not a Digi sim card but a sim card written with Arabic words. SP2 did explain that he relied on the respondent words that it was Digi sim card when he received the same and had written it on P3 based on the respondent's own words. PW2 explanation can be found at pp. 61 - 62 AR vol. 2A as follows:

TPR: The problem is dalam borang dia kata Kad Sim Digi. Jika tiada bantahan, saya pohon tanda telefon bimbit Nokia E72 sebagai P22 dan bersama 1 Kad Sim.

P/bela: YA, since it's open already, P22 as telephone I've no objection. Then we mark P22(A) as a Simcard but it must be stated Sim card Arabic in the phone.

YA Hakim: It is not Card Sim Digi? Alright.

Mahkamah: P22 = ID22

Mahkamah: P22(A) = Kad Sim di dalam telefon bimbit Nokia E72 tulisan Arab.

S: P22(A) Kad Sim yang kamu pasti Kad Sim ini bertulisan Arabic. Saya pohon untuk Sjn. jelaskan kenapa Sjn. kata Kad Sim Digi?

J: Sim dikeluarkan oleh OKT tersebut dan saya ada bertanya "What Sim?". Digi. Dia cuma cakap Digi sebab saya tak faham apa kad sebenarnya di sini. Dia kata Digi dan saya catit Digi.

[29] From the notes as above, it clearly shows that during the trial, there was no real dispute about the sim card. Learned counsel for the respondent in the court below admitted that it was not a Digi sim card but a card which have an Arabic words on it which PW2 and PW3 in their evidence stated that they cannot understand. PW3 unable to carry out a proper investigation due to lack of information in the sim card. We think, PW3 could not be blamed for this. PW3's explanation can be seen at p. 31 of the AR vol. 2B, as follows:

S: Mengenai kad sim Digi, tadi kamu sahkan pada Serah Menyerah, pada Borang Bongkar, kamu tandatangan pada Serah Menyerah, kamu setuju juga bahawa kamu telah check barang, sudah check Serah Menyerah, masih tertera kad sim Digi. Dan kamu check pada telefon itu sendiri tiada sebarang nama Digi, yang ada cuma perkataan Arabic. Saya pohon untuk kamu jelaskan kenapa kamu kata kad sim Digi sedangkan kamu tahu itu adalah perkataan Arabic.

J: Ini saya merujuk kepada pengadu. Saya tanya pengadu di mana sim Digi dan beliau menyatakan itu adalah sim tersebut.

S: Kenapa kamu tiada membuat siasatan lanjut ke atas kad sim tersebut?

J: Tiada maklumat yang saya boleh buat siasatan lanjut.

S: Apa maklumat yang kamu perlukan untuk buat siasatan lanjut?

J: Sekiranya terdapat penama, maksudnya nama penuh dan juga butiran-butiran seperti butiran peribadi dan juga alamat, keadaan tubuh seseorang.

S: Tiada sebarang maklumat?

J: Tiada.

[30] We agree with the learned Deputy that the learned trial judge fell into error when Her Ladyship put the blame on the prosecution's witnesses for the failure to investigate the sim card and D21A without considering the explanation given by PW2 and PW3 that there were no details supplied by the respondent except foreign telephone numbers *per se* without more. We agree with the learned Deputy's submission that there was no effective *Alcontara*'s notice has been given by the respondent. We found there are merits in the learned Deputy's complaint on this issue. The learned trial judge's comment on this issue can be found at pp. 48 - 49 AR vol. 1, as follows:

> Mengenai isu ini, saya bersetuju dengan peguam tertuduh bahawa keterangan SP2 bahawa tertuduh tidak memberikan beliau kad sim DIGI tidak boleh dipercayai. Ini adalah kerana kad sim DIGI yang dirampas dan diterima oleh polis telah direkodkan dengan jelas masing-masing di dalam P8 dan P9 yang mana kandungan-kandungan yang disenaraikan telah diperiksa dan disahkan oleh kedua-dua SP2 dan SP3.
>
> Saya juga berpendapat bahawa jika pihak polis atau SP3 telah menjalankan penyiasatan yang teliti, dengan sekurang-kurangnya mendapatkan seorang penterjemah untuk menyoal siasat tertuduh dan menyiasat kertas yang mengandungi nama dan maklumat seorang yang digelar "Shayan" (D21A) dan juga kad sim DIGI, sudah pasti polis tersebut boleh memastikan siapakah pengedar dadah yang sebenar - Shayan atau tertuduh.

[31] In holding the issue on non-investigation of the sim card in favour of the respondent, the learned trial judge relied on two earlier judgments decided by this court in the case of *Ghasem Gharezadehsharbiani Hassan v. PP* [2014] 1 LNS 752; [2014] 5 MLJ 433 and *Emeka Promise v. PP* [2015] 3 CLJ 916. We had been updated by the learned Deputy that these two earlier decisions had been overruled by the Federal Court on 5 January 2015 and 4 September 2015 respectively. Therefore, the two decisions cited and relied by the learned trial judge was no longer a good law. Wherefore, we have to agree that there is merit in the learned Deputy's complaint with regard to the third issue.

[32] We now come to the final issue on the defence of innocent carrier put forth by the respondent. The learned trial judge accepted the defence of innocent carrier based on the docile conduct of the respondent and accepted the respondent's evidence that the respondent did check the contents of the box and found nothing incriminating. We are in agreement with the observation by Gopal Sri Ram JCA (as he then was) in *Teh Hock Leong v. PP* [2008] 4 CLJ 764 where it was held that the respondent's docile conduct throughout the period he was detained till the discovery of the impugned drugs did not necessarily infer an absence of knowledge of the drugs. The contemporaneous conduct of the respondent must be examined in the light of the situation prevailing at the material time.

[33] In *Teh Hock Leong*, *supra*, the fact was that the appellant was confronted by the police at the arrival gate which is a tight and restricted area with hardly any room for the appellant to make a successful escape. The appellant's chances of a quick gateway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. Any attempt by the appellant to throw away or disassociated himself with the backpack which contained the impugned drugs would have been evidently noticeable. Further, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. The court stated:

> [5] It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600 - 800 meters.
>
> Here again the appellant's chances of a quick gateway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. And. If the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason there is no misdirection by the courts below.

[34] In holding that the defence of an innocent carrier was available to the respondent, the learned trial judge also relied on and accepted the respondent's evidence that the box was given to him by Shayan to be delivered to Shayan's brother, Razak at KLIA. The learned trial judge commented in her judgment, as follows:

> Bagi saya keterangan ini menyokong keterangan tertuduh yang menyatakan bahawa beliau telah membuka kotak P23 tetapi tidak nampak apa-apa barang yang mencurigakan.
>
> Bagi kes ini, saya bersetuju dengan peguam tertuduh bahawa tertuduh tidak mengetahui berkenaan dadah yang disembunyikan di dalam thermos P23F. Sebaliknya saya percaya beliau merupakan seorang innocent carrier dan mangsa penipuan yang telah dipergunakan oleh Shayan yang telah meminta bantuan beliau untuk menghantar satu bungkusan yang difahamkan mengandungi peralatan-peralatan isi rumah kepada seseorang yang bernama Razak di Malaysia. Di dalam keterangannya, tertuduh telah memberitahu perihal seorang Shayan yang

telah meminta pertolongan tertuduh untuk membawa kotak P23 ke Malaysia untuk seorang bernama Razak iaitu seorang pelajar di Malaysia. Keterangannya adalah seperti berikut:

(i) The person who asked me to deliver the box is a family friend. His name is Shayan.

(ii) He gave me the box one hour earlier the flying time on 7.3.2012. The box was given in Baghdad. He is Iranian but he has Iraqi passport. He lives in Iraq for a long time. Mr Shayan knows I'm going to Malaysia and met me and asked me to deliver the box to Razak, which is in Malaysia.

(iii) I said to him yes, no problem. Then he gave me the box. I opened it, I checked inside, I found hairdryer, Hi-Fi and thermos and didn't find anything suspicious. I opened the box to make sure nothing is going to be lost and what items are inside. Shayan told me that the items are for home use.

Saya berpendapat bahawa Shayan adalah seorang yang benar-benar wujud. Keterangan tertuduh boleh disokong oleh D21A, sekeping cebisan kertas yang mengandungi nama dan nombor telefon Shayan yang berada di dalam dompet tertuduh yang telah dirampas oleh pihak polis.

Di dalam kes ini juga, tertuduh di dalam keterangannya telah menyatakan bahawa beliau telah memaklumkan kepada pihak polis berkenaan Shayan dan Razak terutamanya kepada SP2 dan SP3. Di dalam keterangannya, tertuduh telah menyatakan:

> After explained to him about the capsules, I told the Sarjan the box doesn't belong to me and whatever inside the box doesn't belong to me. The person who asked me to deliver the box is family friend, his name is Shayan. And I gave the Sarjan Shayan's number and name. I showed this paper (D21A) to the Sarjan written Shayan's phone number. I also wrote to the Sarjan, Shayan's name in English and phone number and the name of the person I supposed to give the box to.
>
> (Read D21A) 0098-937007822 - Shayan
>
> Shayan gave me his brother, Razak's number, which is a student in Malaysian University, the one I'm supposed to give the box to. Which university I don't know. I saved Razak phone number on my Malaysian sim card and I told the Sarjan that the number was saved on the sim card. The sim card is DIGI sim card, yellow in colour. The sim card was inside the phone (P22) E72 Nokia. This sim card (P22A) is Iraqi sim card - Asia Cell. This sim card I put in my wallet. I didn't use it when I entered Malaysia. I used DIGI sim card.
>
> I told the Sarjan directly to call Razak because he is the owner of that box. Because all Malaysian number I saved in DIGI sim card. In this sim card, I saved the contacts that they can prove that I

A came here looking for a job for e.g Hussein Heli, other Iraqi people who has restaurant, Dr Ali Fauzi is a friend of my father which is the person who introduced me to Hussein.

Sarjan showed me the luggage tag and said my name is there. He said any contacts outside the airport is not his problem. Sarjan said
B I'm responsible for anything inside the airport.

I was trying very badly to explain to the Sarjan about this because my English poor. And there was no interpreter at that time. After they sent me to Sepang jail, I told the same thing to the investigator who asked me questions (a young male).

C When they sent me to this lady, they give her a list of items inside the box to be checked. I also asked her to call Hussein and Razak. When I met the lady, she was tired because she was pregnant. When I asked to call the number, she told me not to tell her what she is supposed to do.

D ...

Saya merujuk kepada kes *Rina Simanjuntak v. PP* [2015] 2 CLJ 912 bahawa tertuduh adalah seorang innocent carrier bagi seorang yang bernama Shayan. Bagi saya, keterangan-keterangan yang telah dikemukakan oleh pihak pembelaan adalah jelas dan mencukupi untuk menangkis (rebut) anggapan di bawah seksyen 37(d) di atas imbangan kebarangkalian.
E

[35] Whether the respondent was an innocent carrier without knowledge or otherwise is a question of fact. Having considered the totality of the evidence before us, with respect, we disagree with the finding of the learned trial judge that the respondent was an innocent carrier. We find that the respondent's
F story to be highly improbable. The respondent had met Shayan only once in Baghdad. It is difficult for us to believe that the respondent so trusted the person who is sending households appliances to Malaysia, the items which are readily available in the Malaysian market.

[36] It is trite law that the defence of innocent carrier carries with it the
G concept of wilful blindness. In his evidence, the respondent said that he had checked the contents of the box P23 and found nothing unusual. The box found to contain a hairdryer, a Hi-Fi and thermos. The respondent only checked the box but he never said that he had checked the thermos, the hairdryer and the Hi-Fi. He said: "I didn't find anything suspicious". To our
H mind, by looking at the three items, the respondent should be curious and suspicious. What so special about the three items which are easily available in open market in Malaysia and they were not costly for them to be imported all the way from Baghdad. With respect, this fact was never considered at all by the learned trial judge.

I **[37]** We find that the respondent is not a naive dumb-witted person. He had been to Malaysia three times before this. All the times, he came for a short period. He came three times for the same purpose, seeking a job. On his final visit, the respondent stated that he was told by Hussain Helli that he had

secured a job for him as a carpenter. So, taken his words, he came here to take up the job. How could the learned trial judge believed him when he came with a backpack containing only two shorts, one T-shirt, one underwear and a pouch bag (see the search list).

[38] There is nothing special about the three items in the box and nothing noble about them. They were brought not as a souvenir without any aesthetical value. They were not valuable items. Nobody would take the trouble to bring them into Malaysia as they were merely normal things openly used by people in the house as admitted by the respondent in his defence. Obviously, the respondent would not take them in the box into Malaysia if not for the more valuable things ie, the impugned drugs cleverly concealed in one of the thermoses.

[39] We are of the view that the respondent had failed to rebut the presumption of knowledge and possession under s. 37(d) of the Act invoked by the learned trial judge on the balance of probabilities. We also of the considered view that the conduct of the respondent amount to a wilful blindness.

[40] On the issue of wilful blindness, we are in no better position than to adopt *in extenso* the view of Raus Sharif PCA (now CJ Malaysia) in the most recent decision of the Federal Court in *PP v. Herlina Purnama Sari* [2017] 1 MLRA 499 where His Lordship said:

> 42. In our judgment, that the manner in which the impugned drugs, were concealed in the two boxes which were found in the Respondent's luggage goes to show that the Respondent knew the contents of the two boxes. It is not enough for the Respondent to merely assert absence of knowledge. On the facts, there are many reasons for the Respondent to be suspicious that the luggage she was carrying contained impugned drugs. But she wilfully shut her eyes. It is preposterous to accept the Respondent's defence that she had agreed to carry something in the luggage to help Jo, a total stranger, to have the two boxes delivered to Jo's friend in Laos.
>
> 43. In our assessment, looking at the evidence in totality, the Respondent could not exculpate herself from her involvement in the trafficking of the seized drugs by saying that she had no knowledge or that she was an 'innocent' when she voluntarily agreed to hand over the boxes to a third party that she hardly knew in another country without enquiring further as to the contents of the said boxes. The Respondent, without any such inquiry, which she would have been reasonably expected to make in any event, had agreed to give the boxes to someone just as a favour for her friend Vivian. The Respondent should have refused to carry out such an assignment if no satisfactory explanation as to their contents was forthcoming from Vivian whom she was in contact with. Her failure to do so makes her guilty of wilful blindness.

A 44. Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by
B (and couplet with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge. From all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. (see *PP v. Tan Kok An* [1995] 4 MLRH 256).

C

45. The concept of "wilful blindness" had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of *Public Prosecutor v. Hla Win* [1995] 2 SLR 424. The doctrine of "wilful blindness" can be summarised to be applicable to a situation where the circumstances are
D such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful
E blindness'. In other words he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.

46. Most of the cases where the concept was held to apply concerned
F cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to dispel or to set straight such suspicions. Should the accused not make any or any
G sufficient inquiries under those circumstances, the concept of wilful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those contents. In other words, if he deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know' he is taken to know.

H 47. In the present case, based on the evidence, it is our view that the respondent is not an innocent carrier but a trafficker. As we have alluded to earlier, in essence the defence of innocent carrier raised by the respondent has no merit because the respondent had every opportunity to check for herself what she was carrying. In our judgment any reasonable person similarly circumstanced would have asked what were in
I those boxes. The respondent here is not a hapless victim caught in the web of inevitable circumstances beyond her control. We find no ring of truth in her story.

[41] As regards the fact that the impugned drugs were securely concealed in the thermos in the box, we echoed the view of Yong Pung How CJ (Singapore) in *Zulfikar Mustaffah v. PP* [2001] 1 SLR 181 as follows at p. 187:

> ... In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> 22 We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v. Hla Win* [1995] 2 SLR(R) 104 (at [51]):
>
> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

Conclusion

[42] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it is our finding that the trafficking charge had been proven beyond reasonable doubt against the respondent.

[43] We, therefore, allowed the appeal. We set aside the order of acquittal and discharge by the High Court and substituted it with an order that the respondent be found guilty and convicted of the trafficking charge. We ordered the respondent to be sentenced to death by hanging.